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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

D.H., Appellant, v. J.C., Respondent.	H043254 (Santa Clara County Super. Ct. No. 1-13-CP020875)

In this child custody dispute, respondent J.C. (mother) sought permission from the trial court to relocate to Nevada with minor G.H. (daughter). Appellant D.H. (father) objected, and the court appointed a child custody evaluator to assist the trial court in evaluating mother's request. Father served a subpoena duces tecum on the child custody evaluator for the expert's psychological testing data of mother, but mother objected to the expert's release of the records. Father filed a motion to compel production of the subpoenaed documents, which the trial court denied in a written order. The trial court also granted mother's request to move to Nevada with the child as a "temporary child custody" order. Father appealed both orders, filing separate notices of appeal.

Father concedes that, because the trial court has since ordered that daughter be relocated back to California to reside primarily with him, his appeal of the move away order is now moot. Nevertheless, father maintains that the trial court's order denying his

motion to compel is not moot because the trial court has not yet made a final determination of "permanent" custody, and the child custody evaluator's conclusions remain relevant to that decision.

Based upon father's representations about the trial court's subsequent orders, we agree that father's appeal of the trial court's move away order is moot, and we dismiss that appeal. As to father's appeal of the order on the motion to compel, we conclude that the trial court did not abuse its discretion in denying father access to mother's psychological data based upon its finding that father was seeking the data only to challenge the reasons for mother's request to move with daughter to Las Vegas. We therefore affirm the order.

I. FACTS AND PROCEDURAL BACKGROUND

Daughter was born in 2009. Father and mother were never married and have not lived together since before child's birth. In 2013, the trial court entered judgment finding that father and mother are daughter's parents. The 2013 judgment did not include any orders related to custody, although a later "temporary" custody order granted mother and father joint legal custody of daughter and gave sole physical custody of daughter to mother.

From birth to 2015, daughter lived with mother in Santa Clara County, California. In April 2015, mother filed a request with the trial court to relocate daughter to Las Vegas, where mother hoped to work for her brother and live near family members to improve her financial prospects. Father opposed mother's request and petitioned the court for a modification of custody and visitation, seeking sole legal custody of daughter and requesting that she primarily live with him. Father also requested a child custody evaluation. The trial court appointed Dr. Michael Kerner, a forensic and clinical psychologist, as the neutral custody evaluator. The parties stipulated that "The purpose and scope of [Kerner's] evaluation is Mother's relocation request to Nevada, Father's request to modify legal/physical custody and visitation, whether the child should be

enrolled in school; and [whether] the child requires special needs services due to speech impairment."

Dr. Kerner completed his custody evaluation and, on September 28, 2015, submitted a report titled "Confidential Child Custody Moveaway Evaluation" to the trial court and the parties. In addition to conducting interviews and making other assessments, Dr. Kerner conducted "psychological testing" of the parents, including the "MCMI-III test," which "is a clinical theory-based, objective, and self-administered test for the assessment of personality patterns and pathology, interpersonal problems, and clinical syndromes." In his report, Dr. Kerner opined that "[p]yschological tests and measures in child custody evaluations provide some empirical foundation for the assessment of parenting, personality, behavior, and/or child developmental functioning."

Although no consent form appears in the record on appeal, Dr. Kerner's report states that, "Each parent executed a Custody Evaluation Consent and Agreement Form in which, among other notifications, they were informed of the limitations on confidentiality in the evaluation process. [¶] Each parent was informed of the purpose and procedures of the assessment and that the findings would be discussed in the comprehensive child custody evaluation, and that the undersigned [evaluator] will be including a copy with his final report to the parties' attorneys and the Court. The parties were also informed that if their case goes to trial, there would then be no confidentiality within the confines of the litigation. Each party acknowledged their understanding and any questions were answered. They each agreed to participate and they each signed a consent form to this effect." As to mother, Dr. Kerner noted that the results of her MCMI-III test indicated "distinct tendencies toward avoiding self-disclosure" and "significant histrionic traits," but that her traits were "consistent to normal function" and did not "rise to a level sufficient to label a personality disorder." Dr. Kerner recommended in his report that mother have primary physical custody of daughter in Las Vegas and that the parents share joint legal custody.

The trial court conducted a four-day evidentiary hearing on mother's request to relocate, during which Dr. Kerner testified. In the course of the hearing, father served a subpoena on Dr. Kerner.[1] Although the record on appeal does not contain a copy of the subpoena, the trial court's later order granting the motion to quash described the subpoena as seeking "the raw psychological testing data including actual responses to psychological testing, of [mother]."[2] The evidentiary hearing concluded on October 14, 2015, without father receiving the discovery sought in his subpoena to Dr. Kerner.

Father objected to the trial court's consideration of the recommendations made in the child custody evaluation without father having access to the underlying psychological data. In overruling father's objections, the court noted the urgency of deciding where daughter should be enrolled in school. The trial court stated, "I am not having a final trial on the issue [of custody] until you have your opportunity to do all of your discovery that you wish to do . . . but I will make temporary orders regarding timeshare." The court noted that its decision was not "a relocation of the residence. It is a temporary timeshare and allowing mother to take the child . . . [¶] . . . out of the state during that timeshare." With respect to father's discovery request for the psychological data, the trial court told father's counsel, "you're going to need to tee up a motion to be heard on a motion to compel."

On October 16, 2015, the trial court granted mother's request to relocate to Nevada in a written order (the Move Away Order). The trial court found that mother was unemployed and sought to move to Las Vegas to work for her brother and to live near her

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[1] The trial court's order states that the subpoena was issued "on or about September 30, 2015." According to father, he served the subpoena on October 6, 2015, and then re-served it on October 21, 2015, following the conclusion of the evidentiary hearing.

[2] Father apparently also sought the data from the tests Dr. Kerner conducted on father, although father has not argued on appeal that he is entitled to that data. He has therefore waived that contention for purpose of this appeal.

family. Although father questioned whether mother's brother had a "real" company, the court found that mother's job offer was "akin to an opportunity in a family-owned business" and mother "is sincere in her intent to pursue this opportunity and is doing so for legitimate reasons that are consistent with the best interests of the child and her duty to provide financial support for her child." Because the parties had not agreed that the court would issue a "permanent custody order" following the evidentiary hearing, the court stated that its order would be a "temporary order" pursuant to *Andrew V. v. Superior Court* (2015) 234 Cal.App.4th 103.

Regarding father's contention that he should be able to obtain discovery of and review "the psychological testing results" of both parents, the trial court noted that mother had objected, father had not yet filed a motion to compel, and Dr. Kerner had testified that "the psychological testing did not show that either parent had a psychological disorder or other psychological anomaly which would cast doubt on the parent's credibility." The trial court indicated that it would "set the matter for further hearing on permanent custody orders, which [would] likely occur in early 2016." Father timely appealed the Move Away Order.

After the trial court issued the Move Away Order, father continued to litigate the subpoena he had served on Dr. Kerner. On November 20, 2015, father filed a motion to compel production of records requested by a subpoena that he first served (according to father's motion) on Dr. Kerner on October 6, 2015, and then reissued on October 21, 2015, for "all notes and psychological testing data and computer scores/graphs/printouts for the [custody case]" but "excluding 'documents which were received directly from parties and served upon each other' during the course of the evaluation." Father argued that the records were not protected by the psychotherapist-patient privilege; mother did not have a privacy right in them; mother waived any privacy rights she might have in the records; and father was willing to stipulate to a protective order.

Father further asserted in his motion to compel that he had secured an expert, Dr. Catherine Main, "to whom the records requested were ordered to be produced. [Father] intends to confer with his outside expert, as is his due process right, to review the appointed evaluator's findings and opinions derived from the notes in order to determine whether . . . there is good cause for him to present a [*sic*] rebuttal expert witness testimony." Father argued he had a due process right to the records, because "it would be impossible for [father] to present a rebuttal expert witness to challenge Dr. Kerner's conclusions and findings without being able to review any of the information and data from which he drew his conclusions. Any rebuttal expert opinion would be necessarily weakened and therefore prejudice Petitioner's case, because it would not be based on the same or sufficient objective information."

On December 4, 2015, mother, representing herself, filed a "Declaration & Memorandum of Points and Authorities in Support of Motion to Quash Subpoena" in which she argued that the records were irrelevant or "[a]t most, the subpoena should to [*sic*] be limited to RELEVANCE of the allegation of HPD or Cluster B only."[3] She further argued that the psychological records were privileged under the doctor-patient privilege and that she had not placed her emotional, mental, or physical health "at issue" such that her privilege would be implicitly waived. Finally, she expressed concern that father's expert was not "neutral," and she would not be able to afford to obtain her own expert to evaluate the data.

The trial court conducted a hearing on the motions to compel and quash on December 10, 2015. Father did not appear at the hearing, either personally or through counsel, and neither father nor his counsel provided notice to the court that they would not attend the hearing. Mother attended the hearing telephonically. Father has not included a transcript of this hearing in the record on appeal.

[3] Mother's motion does not further clarify these references.

On December 28, 2015, the trial court issued a written order entitled "Findings and Order After Hearing [Subpoena Duces Tecum for Psychological Testing Data]" (the Motion to Compel Order). The trial court's order addressed the subpoena duces tecum that father "caused to be served on or about September 30, 2015, on [Dr. Kerner] for production of the raw psychological testing data including actual responses to psychological testing, of [mother], which was obtained by Dr. Kerner in the course of his investigation as the neutral custody evaluator." There is no reference in the trial court's order to any subpoenas father served on Dr. Kerner in October 2015.

The trial court ruled that mother's data was not protected by the psychotherapist-patient privilege, but the data was nevertheless protected by mother's right to privacy under the California Constitution. The trial court further found that mother had not consented to sharing the data through a written waiver; mother had not waived her right to privacy in the disclosure of her responses to the psychological tests; and Dr. Kerner did not make findings based on the results of the psychological testing.

The trial court then stated its findings on the purpose for which father requested mother's psychological data: "From the cross-examination of Dr. Kerner by Petitioner's counsel at the hearing on September 30, 2015, the oral argument of counsel, and the written brief submitted by [father], it appears that [father] is seeking the raw psychological data of [mother], in order to attempt to impeach her credibility with regard to the reasons for her move to Las Vegas." Balancing this need against mother's privacy rights, the trial court found "the potential probative value of the raw psychological data (if any) is outweighed by the privacy rights of [mother]." The trial court denied father's motion to compel and granted mother's motion to quash the subpoena.

Father timely appealed the Motion to Compel Order. Father asserts (without citation to any document in the appellate record) "no hearing for permanent custody orders has yet been scheduled as the parties await conclusion of the relevant expert testimonies necessary to make such permanent orders."

II. DISCUSSION

Before turning to the merits of father's appeal, we first address several procedural points. It took the superior court over two years—a delay not attributable to father—to prepare the record in father's appeals. The passage of time has rendered (according to representations father makes in briefing) one of his appeals moot. Mother has not filed any brief in opposition to father's appeals. "[W]e do not treat the failure to file a respondent's brief as a 'default' (i.e., an admission of error) but independently examine the record and reverse only if prejudicial error is found." (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203; see also Cal. Rules of Court, rule 8.220(a)(2).) However, the absence of briefing from mother leaves us reliant upon father's representations about what has happened since the trial court issued the relevant orders; the appellate record does not contain any subsequent orders.

Furthermore, no copies of any subpoenas issued by father appear in the record on appeal, and we are therefore unable to determine the significance (if any) that the trial court's order addresses a subpoena dated "on or about September 30, 2015," whereas father's motion to compel mentions two subpoenas from October 6 and 21, 2015. Moreover, father does not address this factual discrepancy in his brief, and therefore he has waived any challenge on appeal on this point. Finally, father has not provided us a transcript of the trial court's December 10, 2015 hearing on father's motion to compel. We therefore do not know what the trial court considered at the hearing before it issued the written order that is the subject of father's second appeal.

A. *Appeal of the Move Away Order*

Father states in his opening brief that his appeal of the Move Away Order has been mooted by the subsequent order of the trial court that daughter be relocated back to California to reside primarily with father. We accept his representation and dismiss the appeal of the Move Away Order as moot.

B. *Appeal of the Motion to Compel Order*

With respect to his second appeal, father contends that the trial court abused its discretion in denying his request to compel production of the psychological data and in quashing the subpoena. Father argues that the data pertaining to mother is neither statutorily nor constitutionally privileged, and his due process right to cross-examine and rebut the evaluator's findings outweighs any privacy right enjoyed by mother in the records. Father asserts that his appeal of the Motion to Compel Order has not been mooted by daughter's return from Las Vegas, because father continues to seek the psychological data gathered by Dr. Kerner "so that [father] may complete his cross-examination of the evaluator prior to the completion of a hearing on permanent child custody."

1. Appealability

We first address our jurisdiction to review father's appeal of the Motion to Compel Order. Father's statement of appealability asserts the order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(3) through (a)(13). However, none of these cited subdivisions applies to the Motion to Compel Order. Nevertheless, the trial court did enter a judgment in 2013 relating to parentage and visitation in this case. Accordingly, we have jurisdiction to review the trial court's discovery order as an order after judgment under Code of Civil Procedure section 904.1, subdivision (a)(2).

2. Father's Request for Mother's Psychological Data

We review the trial court's order regarding discovery in this civil custody proceeding for abuse of discretion. (See *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161 (*Krinsky*).) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if

arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712, fns. omitted.)

Trial courts are vested "with 'wide discretion' to allow or prohibit discovery." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540 (*Williams*).) The rules for civil discovery apply to family law cases. (See Fam. Code, § 210; see also *In re Marriage of Boblitt* (2014) 223 Cal.App.4th 1004, 1021–1023.) "Under the discovery statutes, information is discoverable if it is unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence." (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 711, internal quotation marks and citations omitted.)

a. *Physician-Patient and Psychotherapist-Patient Privileges*

Although mother did not file any briefing on appeal, she argued below that the expert's data about her psychological testing was privileged under either the physician-patient privilege codified in Evidence Code section 994 or the psychotherapist-patient privilege codified in Evidence Code section 1014. As we explain below, we reject these contentions and determine the trial court did not abuse its discretion in finding that mother was not a "patient," and thus these privileges do not apply here.

Evidence Code section 1011 defines "patient" as "a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems." (Evid. Code, § 1011.) Here, mother participated in a neutral custody evaluation with Dr. Kerner so that he could assess the best interests of the child; she was not submitting to his evaluation for purposes of making any diagnoses or other treatment as to her mental

condition, nor was any scientific research involved. (See *People v. Cabral* (1993) 12 Cal.App.4th 820, 826–828.)

Although the trial court did not address the doctor-patient privilege in its order, mother was likewise not a "patient" of Dr. Kerner within the meaning of that privilege. (See Evid. Code, § 991 [" 'patient' means a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition"].) The trial court therefore did not abuse its discretion in concluding that, under these facts, the statutory privileges applicable to patients did not apply to the records father sought.

b. *Consent and Waiver*

Father argues that mother waived any objection based on her right to privacy by not asserting it in her written objections, that she consented to the release of the data, and that she placed her psychological fitness "at issue" by requesting to move daughter to Las Vegas, therefore implicitly waiving any privacy right in the data.

Like the trial court, we find no grounds for waiver. It is true that mother appears to have only objected to the release of the psychological data in the expert's records on the statutory privilege grounds applicable to patients. However, father cites no persuasive authority for finding that mother's failure to object specifically on constitutional privacy grounds waives her right of privacy. We decline to adopt such a "draconian rule" in these circumstances. (*Heda v. Superior Court* (1990) 225 Cal.App.3d 525, 529.)

Father also argues that mother consented to the disclosure of the raw psychological data. He points in particular to the passage from the evaluator's report, stating mother "executed a Custody Evaluation Consent and Agreement Form," acknowledged the limitations on confidentiality in the evaluation process and the report, and agreed that "if their case goes to trial, there would then be no confidentiality within the confines of the litigation." (Italics and emphasis omitted.) However, the evaluator's

report does not show mother consented to a release of the underlying psychological data; nor is the actual consent form present in the record before us. We decline to imply consent under these facts. We therefore conclude that the trial court did not abuse its discretion in finding that mother had not consented or otherwise waived her right to privacy as to the psychological data.

Finally, father also suggests that mother cannot object to the disclosure of the data because she placed her psychological state "at issue" when she petitioned the trial court to move to Las Vegas with their child. We do not agree that, by requesting a court order for temporary custody to move with daughter to Las Vegas to improve her ability to financially support daughter, mother thereby placed her psychological information "at issue," such that she has waived any privacy interest in her psychological data. (See *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1149 (*Manela*).)

c. *Right to Privacy*

In its Motion to Compel Order, the trial court concluded that mother's right to privacy outweighed any probative value of her psychological data to father's "attempt to impeach her credibility with regard to the reasons for her move to Las Vegas." Father argues primarily that mother had no reasonable expectation of privacy in this setting and that, in any event, father's statutory and due process rights in litigating child custody outweigh any privacy interest held by mother.

"The state Constitution expressly grants Californians a right of privacy. (Cal. Const., art. I, § 1.)" (*Williams*, *supra*, 3 Cal.5th at p. 552.) "Protection of informational privacy is the provision's central concern." (*Ibid*. citing to *Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 35 (*Hill*).) As explained by the California Supreme Court, *Hill* established the relevant analytical framework. "The party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious. The party seeking information may raise in response whatever legitimate and

important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations." (*Williams, supra,* at p. 552, internal citations omitted.)

"*Hill* observed that whether a legally recognized privacy interest exists is a question of law, and whether the circumstances give rise to a reasonable expectation of privacy and a serious invasion thereof are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Pioneer Electronics* (*USA*), *Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370 (*Pioneer Electronics*).)[4]

Here, there is no doubt that mother possesses a constitutionally-protected privacy right to her psychological information. Father appears to argue that her constitutional right only attaches to a "patient's medical history" rather than "court-ordered evaluation records of a non-patient." However, that argument fails given the broad "informational" scope of the privacy interest under the California Constitution, which precludes "the dissemination or misuse of sensitive and confidential information." (*Hill, supra,* 7 Cal.4th at p. 35.)[5]

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[4] The California Supreme Court has further noted that the *Hill* test, though "conceived in the context of a pleaded cause of action for invasion of privacy, has been applied more broadly," including to asserted claims of privacy in personal data. (*Williams, supra,* 3 Cal.5th at p. 552.)

[5] Courts have applied the *Hill* test to privacy rights asserted by a party in the course of civil discovery. (See, e.g., *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198–1199.) Moreover, the psychological information at issue here is akin to an individual's fundamental right to privacy over "the state of his [or her] mind." (See *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440–441; see also *People v. Martinez* (2001) 88 Cal.App.4th 465, 474–475 ["It is settled that a person's medical history, including psychological records, falls within the zone of informational privacy protected under Section 1."].)

Although the trial court did not cite to *Hill* or *Pioneer Electronics* or expressly find that mother established the other requirements cited in those cases—namely, "a reasonable expectation of privacy under the particular circumstances" and a threatened intrusion that is serious rather than "trivial" (*Pioneer Electronics*, *supra*, 40 Cal.4th at pp. 370–371)—we infer that the trial court implicitly made such findings. "Under the doctrine of 'implied findings,' if the record is silent, we must presume the trial court fully discharged its duty to consider all of the relevant statutory factors and made all of the factual findings necessary to support its decision for which there is substantial evidence." (*Brewer v. Carter* (2013) 218 Cal.App.4th 1312, 1320.) The record amply supports the trial court's decision. Mother did not explicitly consent to disclosure of her psychological data, and the threatened intrusion, the disclosure of her psychological data and testing, is not a "trivial" invasion. *(Pioneer Electronics, supra,* at p. 371.) After all, father seeks to use mother's data to suggest her emotional deficiencies as a parent.

Nevertheless, establishing that mother has a protected privacy interest in her psychological data collected by Dr. Kerner does not end the analysis. The constitutional right to privacy "is not absolute." (*Manela, supra,* 177 Cal.App.4th at p. 1150.) A court must balance this right against "whatever legitimate and important countervailing interests disclosure serves" that are raised by the party interested in disclosure. (*Williams, supra,* 3 Cal.5th at p. 552, internal citations omitted.)

Father argues that he requires the data in order to "complete his cross-examination of the evaluator prior to the completion of a hearing on permanent child custody" as well as to provide the data to his rebuttal expert. Section 733 of the Evidence Code provides a parent the right "to hire an expert to rebut the opinion of the court-appointed expert." (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 366.) Further, "where possible, the courts should impose partial limitations rather than outright denial of discovery." (*Williams, supra,* 3 Cal.5th at p. 559.)

Father thus asserts a weighty interest in the records possessed by Dr. Kerner. However, father's argument that he is entitled to the data for the "permanent" custody determination runs aground on the factual finding made by the trial court that father sought mother's data for the limited purpose of impeaching the credibility of her asserted reasons for her move to Las Vegas. In his briefing, father makes no meaningful attempt to attack this factual finding, which we review for substantial evidence. (*Krinsky*, *supra*, 159 Cal.App.4th at p. 1162.)

"[T]o be successful on appeal, an appellant must be able to affirmatively demonstrate error on the record before the court. ' " 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " ' " (*In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 8.) Neither father nor his counsel attended the hearing on his own motion to compel, and father has not provided a transcript of that hearing. In the absence of a reporter's transcript or a settled statement about what occurred at the hearing on the motion to compel, we must presume that what transpired at that hearing supports the subsequent order. (See *id*. at p. 9.)

In his briefing in the trial court submitted before the hearing on the motion to compel, father asserted that "it would be impossible for [father] to present a rebuttal expert witness to challenge Dr. Kerner's conclusions and findings without being able to review any of the information and data from which he drew his conclusions." This vague assertion does not clarify whether father sought the records for some purpose beyond the immediate issue before the trial court, namely mother's desire to move daughter to Las Vegas.

The trial court's order that is the subject of this appeal states that it addresses a subpoena served "on or about September 30, 2015, on [Dr. Kerner],"—during the evidentiary hearing on mother's move away request. The trial court then found that father sought mother's psychological testing data for the limited purpose of impeaching

her reasons for wanting to move to Las Vegas. On the sparse record before us we cannot explain—and father does not address this point in his briefing—why the trial court's order is directed toward the subpoena served during the hearing rather than the subpoena father issued to Dr. Kerner after the trial court issued its Move Away Order.

We also do not know the specific basis for the trial court's conclusion that father did not seek Dr. Kerner's data to challenge a future "permanent" custody determination, although it is clear that the trial court reached this conclusion. It is father's burden to demonstrate error, and he has failed to do so.

Given the deficiencies in the record with respect to the hearing on father's motion to compel, we cannot say that the trial court erred in its later factual determination of the limited nature for which father sought mother's psychological data. In light of the timing of father's original subpoena, and that the Move Away Order was the only issue immediately before the trial court at that time, substantial evidence supported the trial court's conclusion that father sought Dr. Kerner's data for the limited purpose of impeaching mother's reasons for her move. Considering only that narrow purpose, we see no abuse of discretion in the trial court's conclusion that mother's privacy interests in her psychological data outweighed father's need for the data. (See *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1200.)

We recognize that, according to father, daughter no longer resides in Las Vegas, and the trial court has stayed custody proceedings pending these appeals. Although we cannot independently confirm these assertions, we accept them as true for purposes of this appeal. Father's briefing in this court makes clear that he now seeks Dr. Kerner's records for the "permanent" custody determination. If father were to reissue the subpoena for this purpose, a trial court, applying the relevant legal factors, might well conclude that father—or at least father's expert—should have access to the data possessed by Dr. Kerner if the records were disclosed with appropriate protective orders and limitations.

That issue, however, is not before us. The trial court's order that is the subject of this appeal was not addressed to a discovery dispute related to a "permanent" custody determination. Instead, the trial court found that father sought mother's data only for the limited purpose of impeaching her reasons for her request to move with daughter to Las Vegas. Based upon this narrow description of father's interest, the trial court did not abuse its discretion in denying father's motion to compel discovery.

III. DISPOSITION

The appeal of the Move Away Order is dismissed as moot. The trial court's Motion to Compel Order is affirmed.

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DANNER, J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, ACTING, P.J.

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GROVER, J.

D.H. v. J.C.
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